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In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 302

BERNARD MORTIMER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals is reported at 343 F. 2d 500 (Pet. 4a–10a).

JURISDICTION

The judgment of the Court of Appeals was entered on March 23, 1965 (Pet. 11a). Petition for rehearing was denied by the court on April 29, 1965 (Pet. 12a). Mr. Justice Clark extended the time for filing a writ of certiorari to June 28, 1965 (Pet. 13a). The petition for a writ of certiorari was filed on June 28, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether, in the circumstances of this case, it was plain error for the district judge to pass sentence without referring the case to the probation service for a pre-sentence investigation.

2. Whether the court's ruling confining cross examination of a government witness to subject matter within the scope of the direct examination was prejudicial error.

3. Whether the court committed prejudicial error in excluding cumulative documentary evidence that in April 1961 petitioner purchased a bank money order to pay federal income taxes.

STATUTE AND RULE INVOLVED

Internal Revenue Code of 1954:

> SEC. 7201. ATTEMPT TO EVADE OR DEFEAT TAX.
>
> Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 5 years, or both, together with the costs of prosecution.
>
> (26 U.S.C. 7201.)

Federal Rules of Criminal Procedure:

> Rule 32. *Sentence and Judgment*
>
> * * * * *
>
> (c) *Presentence Investigation*
>
> (1) *When Made.* The probation service of the court shall make a presentence investigation and report to the court before the imposition of sentence or the granting of probation

unless the court otherwise directs. The report shall not be submitted to the court or its contents disclosed to anyone unless the defendant has pleaded guilty or has been found guilty.

(2) *Report.* The report of the presentence investigation shall contain any prior criminal record of the defendant and such information about his characteristics, his financial condition and the circumstances affecting his behavior as may be helpful in imposing sentence or in granting probation or in the correctional treatment of the defendant, and such other information as may be required by the Court.

* * * * *

STATEMENT

Petitioner waived a jury and after a five-day trial was found guilty by the United States District Court for the Northern District of Illinois on each of four counts charging tax evasion for the years 1957 through 1960 (R. 1).[1] The court imposed consecutive sentences of six months and fines of $1,250 on each of the four counts (R. 243).

Petitioner is a doctor practicing as an obstetrician and gynecologist in Joliet, Illinois (Pet. 5a). He testified that he told his nurse to enter fees received in a "daily log book" and then to post them to the patient's individual account card (R. 14, 34, 168). Petitioner testified that in filing his income tax returns he reported the amounts shown in the daily log book (Pet. 5a, R. 167). The Internal Revenue agents'

[1] "R." references are to the petitioner's appendix in the court of appeals.

investigation showed (and the court below found) that throughout the 4 years here in question the revenues recorded on the individual account cards exceeded those shown in the daily log book and reported on petitioner's tax return by about 40% (Pet. 7a):

	Receipts per Account Cards	Receipts per Tax Returns	Difference
1957	$45,630	$30,875	$14,755
1958	44,205	29,516	14,689
1959	46,261	27,773	18,488
1960	43,778	29,046	14,731

Between August 31, 1961, and May 14, 1962, two investigating agents analyzed records made available to them at petitioner's office (R. 30–31, 72–73). The year 1958 was the only full year for which the daily log book was produced for examination; it was also produced for the last half of 1960 (R. 95–96). Petitioner stated that no other log books could be found (R. 46).

At the beginning of the examination petitioner told the agents he had one small file of patient's ledger cards and he permitted them to examine it (R. 34). Comparison of the 1958 log book and this card file showed discrepancies (R. 35–37) which petitioner said must have been accidental (R. 37). Thereafter the agents gave petitioner or his nurse lists of additional patients whose cards they wished to examine. Petitioner said on several occasions that there was no other file of cards and that many cards had been destroyed because they were obsolete (R. 34, 43, 50, 59, 71). After the agents advised him that they might

have to contact the patients, however, additional cards were either furnished by petitioner from time to time (R. 36, 47, 49, 55, 56, 72), or found inserted in the file previously furnished (R. 46). By March 30, 1962, a total of 682 cards had been made available (R. 50). On that date petitioner stated that he had found a file which was "inactive" in that there had been neither recent payments nor office activity (R. 56); by April 12, 1962, he had produced 309 more cards and, on April 17, 1962, he allowed the agents to go through this new file (R. 56–57). The agent again insisted that there were still more cards. Although petitioner denied this (R. 59, 71), he later produced 42 cards, 33 of which contained entries between 1957 and 1960 (R. 73, 93–95).[2]

Petitioner testified that he deposited just enough cash to cover his checks for office expenses (R. 212), and used his remaining cash and checks, plus cash and checks received by his wife, plus cash that he and his wife had accumulated in prior years, to purchase bank money orders totalling more than $150,000 during the four prosecution years (Pet. 7a–8a; R. 245–249).

ARGUMENT

1. There is no merit in the argument (Pet. 7–15) that the trial judge erred in imposing sentence without first obtaining a presentence investigation and report. The point was not raised in either of the courts below and petitioner has made no showing that his case is "exceptional" or that the alleged error was

[2] Of the 905 cards which petitioner produced after March 30, 1962, 63 contained fees of $100 or more, compared to 16 such fees in the cards examined before March 30, 1962 (R. 93–95).

"plain". Cf. *Lawn* v. *United States*, 355 U.S. 339, 362, fn. 16. In fact, petitioner made no motion whatever for a presentence investigation and indeed invited the immediate imposition of sentence by addressing the court briefly (by his counsel and then by himself) on the question of mitigation of sentence (R. 241–242). Moreover, there is nothing in Rule 32 which forbids a judge from imposing sentence without first obtaining a pre-sentence investigation. In the instant case the sentencing judge had presided at petitioner's five-day trial where petitioner had testified at length in his own behalf and petitioner's personal and professional background were elaborated by character witnesses (R. 179–181, 213–214) and otherwise. The circumstances of the offenses were fully developed. There was no necessity to evaluate petitioner's role in the context of accomplices or co-defendants or to collect prior juvenile or criminal records. There was no need to consider related pending criminal charges or the possibility that petitioner might be mentally ill. The condition of petitioner's physical health was known to the court, and the prison terms imposed were only one-tenth of the maximum which could have been imposed.

There is no substance to the contention that two cases in the District of Columbia Circuit conflict with the present case (Pet. 7, 12). In *Peters* v. *United States*, 307 F. 2d 193 (C.A.D.C.), the court imposed maximum five-to-fifteen year sentences on 19 and 21 year old defendants immediately after verdict, without giving the defense so much as a chance to argue in mitigation of sentence. And *Leach* v. *United States*, 334 F. 2d 945 (C.A.D.C.), has nothing to do

with Rule 32; in that case the sentence was set aside on the ground that the trial court's refusal—in the face of persistent demands by the defense—to order a pre-sentence mental examination constituted an abuse of discretion because there were many indications of mental illness. Where, as here, there is no abuse of discretion, the non-use of a pre-sentence investigation is no ground for reversal, and this would be so even though the defendant had made a proper motion in the trial court and preserved his objection on appeal. *United States* v. *Karavias,* 170 F. 2d 968 (C.A. 7); *United States* v. *Schwenke,* 221 F. 2d 356 (C.A. 2); *United States* v. *Williams,* 254 F. 2d 253 (C.A. 3); *Roddy* v. *United States,* 296 F. 2d 9 (C.A. 10).

2. Also without substance is the contention (Pet. 15–16) that petitioner was unduly restricted in his cross-examination of Miss Shea, petitioner's office nurse during the prosecution years. On direct examination as a government witness (R. 12–16) she described her record keeping and other duties. In part she said that occasionally she would post payments directly from the patient's check to the ledger card although the normal procedure was to post from the logbook. She also stated she had destroyed records when instructed by petitioner. (R. 16.) On cross-examination, she was asked this question by defense counsel (R. 20):

> Q. * * * In all the years you worked for Dr. Mortimer, Miss Shea, did Dr. Mortimer ever so much as once ask you to post directly to the

ledger cards or deliberately omit any kind of financial information?

Mr. JOYCE: Objection, your Honor.

The COURT: Sustain the objection.

Mr. SOKOL: If the Court please, this is legitimate cross examination.

The COURT: Oh, I have been here; I have listened. I don't think that is within the scope of the direct examination, Mr. Sokol. There is no testimony on direct that the defendant ever directed this witness to do anything irregular.

The double framing of the question and its argumentative tenor undoubtedly colored the trial court's view of its meaning. The judge was certainly correct that the witness' direct testimony in no way accused petitioner of giving her irregular instructions. Moreover, petitioner was not deprived of the substance of this point. During subsequent cross examination of Miss Shea the court permitted defense counsel to show that the only reason she occasionally by-passed the log book in posting to the cards was by reason of being busy (R. 23), and then petitioner testified without objection that he did not instruct Miss Shea to omit anything from any of the office records (R. 193). Petitioner thereafter made no attempt to recall Miss Shea as a defense witness on this point.

3. Defense Exhibit 5 was excluded from introduction into evidence (R. 190–191). It was a $2100 bank money order purchased by petitioner on April 14, 1961, and payable to the Internal Revenue Service. Defense counsel offered this exhibit "for the purpose of showing intent" and on the issue of concealment without articulating the reasons now stated in his

petition. (Pet. 6, 17.) The government objected that the document was outside the prosecution years. Collateral issues attendant on admitting such evidence are easily foreseen, and the government had introduced no money orders outside prosecution years. Moreover, petitioner made the same point to better effect in his own testimony that he paid income taxes with bank drafts (R. 189); thus the physical document was merely cumulative.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted,

ARCHIBALD COX,
Solicitor General.
JOHN B. JONES, JR.
Acting Assistant Attorney General.
RICHARD B. BUHRMAN,
JOHN P. BURKE,
Attorneys.

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REPLY BRIEF FOR PETITIONER

ABE KRASH
ARTHUR E. STROUT
MURRAY H. BRING
1229 Nineteenth Street, N.W.
Washington, D. C. 20036
Attorneys for Petitioner

Of Counsel:

ARNOLD, FORTAS & PORTER
Washington, D. C.

JOHN F. KELLY
TAYLOR & KELLY
Chicago, Illinois

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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REPLY BRIEF FOR PETITIONER

Petitioner submits this Reply Brief in order to clarify two misconceptions in the Government's Brief in Opposition:

1. On page 6 of its Brief, the Government asserts that, following conviction, petitioner "invited the immediate imposition of sentence". The record shows, to the contrary, that the trial judge proceeded with sentencing immediately following the adjudication of

guilt, despite a request by petitioner's counsel that sentencing be deferred (R. 240-41):

"[The Court]: There will be a judgment of conviction in respect to each count.

I will hear from you, Mr. Sokol.

Mr. Sokol [Petitioner's Counsel]: If the Court please, could we defer this? I am a little spent.

The Court: Defer what?

Mr. Sokol: If the Court please, I have no motions to make at this time. The only motion—I presume this is what the Court is asking?

The Court: What is the government's position? You mean you want to go until tomorrow morning to consider what you want to say to me tomorrow morning and what your client may want to say to me?

Mr. Sokol: I would be perhaps better prepared to respond to your Honor if I understood what—I don't quite understand what your Honor is asking me?

The Court: Your client has been convicted.

Mr. Sokol: Yes.

The Court: What do you ordinarily say after the judge has entered a judgment of conviction? What do you say? I am not trying to put words in your mouth. I am giving you an opportunity to be heard.

Mr. Sokol: If it is a matter of discussing mitigation, if the Court please, then—

The Court: You say anything you like to say. I am going to give you an opportunity to be heard after a judgment of conviction. We do it in every criminal case. We are obligated under the law to do it and we are obligated to hear the defendant under the Constitution.

Mr. Sokol: I would like to confer. I would like to have a few minutes to confer with the defendant before I respond.

The Court: All right.

We will recess for a few minutes.

(Brief recess)"

This colloquy clearly demonstrates that the trial judge was determined to impose sentence immediately, and that he would not even put the sentencing over for a day so that petitioner's counsel, who was "spent" after an exhausting trial, might have time to collect his thoughts and consider what motions he wished to make.

2. The Government contends (p. 6 of its Brief) that because the judge "had presided at petitioner's five-day trial", listened to petitioner's testimony in his own behalf, and heard the testimony of character witnesses, and because "the circumstances of the offenses were fully developed" at the trial, there was no need for a pre-sentence report in this case.

Petitioner suggests that the Government's argument not only misconceives the nature and purpose of the pre-sentence report, but also credits the trial judge with a degree of clairvoyance that the drafters of the Federal Rules of Criminal Procedure refused to recognize.

While it may be true, as the Government suggests, that "the circumstances of the offenses were fully developed" at the trial, it is certainly *not* true that the circumstances relevant to the imposition of sentence were fully developed at the trial. All of the testimony at the trial was, as is proper, directed to one issue—whether petitioner committed the crime with which he was charged. There was no medical testimony with respect to petitioner's health or his mental condition. Nor was any evidence introduced relating to petitioner's home life and the impact that a jail sentence might have on his ailing wife. Indeed, as the following excerpt from petitioner's examination of Special Agent

Smith reflects, the trial judge considered any testimony relating to the health of petitioner's wife as irrelevant and precluded its introduction into evidence (R. 122):

> "Q. Do you recall, sir, how many times you inquired about Dr. Edna's [petitioner's wife] health and how many times you conversed with Dr. Bernard Mortimer about Dr. Edna's health?
>
> Mr. Crowley: I will object to this, your Honor. This is irrelevant.
>
> The Court: I will sustain the objection. Please don't waste my time, Mr. Sokol. If the man was polite and wanted to know about a taxpayer's wife, that establishes him as a very gentlemanly officer of the United States, but it has nothing to do with the issues in this case. If she was sick, she evidently recovered, because she has been very diligently engaged in taking notes all through this trial."

Contrary to the impression conveyed by the Government's Brief, any bits of information pertinent to sentencing which may have been testified to could not have given an accurate background for sentencing purposes. Indeed, the draftsmen of the Model Penal Code have vigorously rejected the Government's suggestion that evidence introduced during the course of trial is an adequate substitute for a pre-sentence report:

> "In any system in which large discretion as to sentence has been vested in the court, it is obviously of the first importance that the court obtain accurate information on the many matters that are relevant to what the sentence ought to be. Even if the case was tried, the evidence may only give a partial picture of the circumstances of the crime . . . . In any case, the evidence is likely to give relatively little insight with respect to the history and character of the offender . . . . The use and full development of this device appears to us to

offer greatest hope for the improvement of judicial sentencing." Model Penal Code, Proposed Official Draft, 1962, p. 119, Tentative Draft No. 2, 1954, pp. 52-53.

Petitioner believes that the other points raised in the Government's Brief are adequately covered by the Petition.

Respectfully submitted,

ABE KRASH
ARTHUR E. STROUT,
MURRAY H. BRING
1229 Nineteenth Street, N.W.
Washington, D. C. 20036
Attorneys for Petitioner

Of Counsel:

ARNOLD, FORTAS & PORTER
Washington, D. C.

JOHN F. KELLY
TAYLOR & KELLY
Chicago, Illinois

August, 1965

END